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**IN THE
COURT OF APPEALS OF INDIANA**

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No. 45A03-0708-CV-417

CITY OF HAMMOND,
Appellee-Respondent.

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable John M. Sedia, Special Judge
Cause No. 45D11-0611-PL-113

April 30, 2008

CRONE, Judge

Case Summary

Timothy A. Thomas appeals the termination of his employment as a member of the Hammond Police Department by the City of Hammond Board of Public Works and Safety (“the Board”). We affirm.

Issue

Was the Board’s termination of Thomas’s employment arbitrary and capricious?

Facts and Procedural History

In its decision, the Board found the following facts:

1. Timothy Allen Thomas was hired in 1980 as a police officer in the City of Hammond, and presently is a Sergeant.
2. Chief Miller sent a letter to the Board of Public Works, in June of 2006, along with a corrected letter, requesting the termination of Timothy Thomas, based upon the events, which occurred on December 31, 2005.
3. On December 31, 2005, Timothy Thomas, without supervisor permission, nor completed agreement form, contacted a civilian [Nicholas Kokot], and had him accompany Timothy Thomas as a civilian ride-along.
4. That civilian was outfitted with a bulletproof vest, armed with a side arm as well as an AR-15 assault rifle.
5. That civilian was “deputized” by Officer Thomas on the night of his ride-along, asking him to raise his hand and swear to uphold the constitution, despite having no legal authority to take this action.
6. The armed civilian was permitted by Officer Thomas to perform law enforcement duties including display of the weapons to citizens, physical touching of citizens, including reverse arm-bar holds, takedown, pat-downs, armed back up and foot pursuit.
7. On December 31, 2005, a 911 call came in to Hammond Police Department regarding shots being fired on Moss Street, in Hammond, Lake County Indiana.

8. Timothy Thomas and his civilian were on scene, without contacting the communications center (radio room), and not informing other police officers on duty of his, or his civilian's presence, on the scene.
9. When Timothy Thomas did make contact with the communications director, he specifically requested that no backup be dispatched yet to the area of the shooting.
10. Timothy Thomas and his civilian ride-along exited the police vehicle and the armed civilian ran to the back of the Moss Street location in question to attempt to confront the subjects involved in the shooting.
11. While investigating the shots fired call, Timothy Thomas shot a suspect named Jermaine Taylor, who was running towards Timothy Thomas, away from the direction of the armed civilian, coming from in-between 1114 and 1116 Moss Street, while reaching into his clothing as if for a weapon.
12. The flushing out actions of this civilian ride-along was [sic] not reported in the police report submitted by Timothy Thomas.
13. This non-disclosure hampered the subsequent investigation of Timothy Thomas's shooting of the suspect, in that the area where the civilian ride-along was located was not forensically examined, and no investigation of the civilian's weapon was performed to determine whether or not it had been fired.
14. Timothy Thomas did not disclose the presence nor involvement in the shooting that occurred of his civilian ride-along in his initial report given to Lake County Police.
15. The civilian ride-along, following the shooting, did not remain at the immediate scene, but instead was down the street, out of sight.
16. The civilian ride-along's dress, behavior and actions on the night of December 31, 2005, made it appear as if he was a police officer, engaging in police activity.

Appellant's App. at 12-14.

In response to Chief Miller's request, the Board held a public hearing on September 7, 2006. On October 5, 2006, the Board issued a decision with the abovementioned findings of fact and the following ultimate findings:

2. Based upon the testimony, exhibits and evidence presented to the Board at the public hearing held on September 7, 2006, the Board hereby finds Timothy Thomas violated police rules, engaged in conduct injurious to the public peace or welfare and committed a breach of discipline by:
 - a) Permitting an armed civilian to engage in substantial Law Enforcement Activity, putting not only the civilian, but also citizens of Hammond, at risk of injury. This civilian assisted Timothy Thomas in the performance of duties as police officer, without legal authority, a violation of the Cannons [sic] of Police Ethics, Article 4.
 - b) Not only omitted, but concealed, the presence and involvement of a material witness in an officer involved shooting. This information was concealed from the Hammond Police Department, as well as the Lake County Sheriff's Detectives. The refusal to call for back up when warranted, and the allowing of the armed civilian ride-along to hide himself at the end of the street following the shooting, to remain out of view of responding officers, coupled with the possible loss of ballistics evidence as a direct result of the concealment of this civilian's activities, is a violation of Gen. Ord. 88-8 (IV), CC, and Department Rules and Regulations, Article VII Sections 7.9 and 7.12.
3. This decision of the Board is based upon substantial evidence received in accordance with the requirements of due process.
4. The recommendation of Chief Brian Miller for termination of the employment of Timothy Thomas as a police officer is appropriate and should be upheld.
5. It is the decision of this Board that Timothy Thomas be terminated as a sworn police officer of the City of Hammond this 5th day of October, 2006.

Id. at 15-16.

Thomas petitioned for judicial review of the Board's decision. The trial court held a hearing on July 20, 2007. Five days later, the trial court issued an order that reads in pertinent part as follows:

2. There was sufficient evidence presented at the Hearing to support the findings of the Board that Thomas did permit an armed civilian to accompany him on patrol and participate in police activity while engaged in his duties as a Hammond police officer on December 31, 2005 during which patrol an offer-involved shooting took place; and that Thomas omitted and concealed the presence and involvement of the armed civilian on the patrol until January 6, 2006 at the earliest.

3. There was also sufficient evidence presented at the Hearing to support the findings of the Board that the presence and active participation of this civilian put the civilian and the citizens of Hammond at risk of injury in that this civilian assisted Thomas in the performance of his duties as a police officer without legal authority.

4. Although both counsel for Thomas and counsel for the City of Hammond (hereinafter City) devoted a great part of their arguments around the issue of whether or not Thomas complied with the civilian drive along program, the Court does not reach the issue of compliance for the reason that the Board did not cite a violation of the civilian drive along program by Thomas as a basis for his termination.

The Court, being fully advised, now makes the following conclusions of law:

....

3. Departmental General Order #88-8 (IV) CC provides as follows:

All officer's reports shall be accurate, legible, complete and turned in before the end of their tour of duty.

Department Rules and Regulations, Article VII, Sections 7.19 and 7.12 provide as follows:

S.7.9 Officers and civilians shall properly report any information them [sic] regarding matters which may indicate the need for action or recording by the department.

S.7.12. All information, the dissemination of which is not prohibited by departmental policy, shall be provided to persons requesting the same courteously and accurately.

The Canons of Police Ethics, Article 4, provides as follows:

The employment of illegal means, no matter how worthy the end, is certain to encourage disrespect for the law and officers. If the law is to be honored, it must first be honored by those who enforce it.

4. No issue was raised as to whether or not Thomas was subject to Departmental General Order #88-8, Department Regulations, Article VII Sections 7.9 and 7.12, or the Canons of Police Ethics, Article 4.

5. The Findings of Fact, as set forth above, which were based upon substantial evidence received by the Board at the hearing of September 7, 2006, are sufficient to demonstrate a violation of General Ordinance 88-8(IV) CC and Department Rules and Regulations, Article VII, Sections 7.9 and 7.12: by failing to include the presence of the armed civilian at the December 31, 2005 patrol in any incident report and to Thomas's supervisors until nearly a week after the incident; and the Canons of Police Ethics, Article IV: by allowing an armed civilian to assist him in the performance of his duties as a police officer without legal authority and actively participate in a patrol which resulted in an officer-involved shooting of a suspect; which put not only the armed civilian but also the public at large in jeopardy. It seems beyond the dispute of reasonable minds that the presence, and more importantly, the participation of an armed civilian, with no legal authority to act as a law enforcement officer, in a confrontation with and ultimate shooting of an armed subject is an event that evokes a high risk of danger and liability and should be disclosed immediately by a sworn officer to his superiors. An occurrence like this is, no doubt, one of the reasons that the City enacted General Order #88-8, Departmental Regulations, Article VII Sections 7.9 and 7.12, and the Canons of Police Ethics, Article 4.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the decision of the Hammond Board of Public Works of October 5th, 2006 terminating Sergeant Timothy Thomas from his employment as a sworn police officer of the City of Hammond is AFFIRMED.

Id. at 339-41. Thomas now appeals.

Discussion and Decision

In considering Thomas's appeal, we employ the following standard of review:

Our review of an administrative decision is limited to whether the agency based its decision on substantial evidence, whether the agency's decision was arbitrary and capricious, and whether it was contrary to any constitutional, statutory, or legal principle. We are not allowed to conduct a trial de novo, but rather, we defer to an agency's fact-finding, so long as its findings are supported by substantial evidence.

Citizens Action Coal. of Ind., Inc. v. NIPSCO, 804 N.E.2d 289, 294 (Ind. Ct. App. 2004) (citation omitted). "Neither the trial court nor this court may reweigh the evidence or reassess witness credibility." *Andrianova v. Family & Soc. Servs. Admin.*, 799 N.E.2d 5, 7 (Ind. Ct. App. 2003).

The challenging party has the burden of proving that an administrative action was arbitrary and capricious. An arbitrary and capricious decision is one which is patently unreasonable. It is made without consideration of the facts and in total disregard of the circumstances and lacks any basis which might lead a reasonable person to the same conclusion.

City of Indpls. v. Woods, 703 N.E.2d 1087, 1091 (Ind. Ct. App. 1998) (citation omitted), *trans. denied* (1999).

"The discipline of police officers is within the province of the government's executive, rather than judicial, branch. For this reason, we will not substitute our judgment for that of the administrative body when no compelling circumstances are present." *Sullivan v. City of Evansville*, 728 N.E.2d 182, 186 (Ind. Ct. App. 2000) (citation and quotation marks omitted). Indiana Code Section 36-8-3-4(b)(2)(B) provides that a police officer may be "disciplined by demotion, dismissal, reprimand, forfeiture, or suspension upon ... a finding and decision of the safety board that the [officer] has been or is guilty of any one (1) or

more” of nine enumerated acts of misconduct, including a violation of rules, conduct injurious to the public peace or welfare, or “[a]nother breach of discipline.” Here, the Board found that substantial evidence was presented that Thomas put Hammond’s citizens at risk by taking an armed civilian out on patrol and that he violated several applicable rules and regulations, including the requirement that an officer’s reports be “accurate, legible, *complete* and turned in before the end of their tour of duty” pursuant to General Order 88-8. (Emphasis added.)

Thomas’s argument to the contrary is essentially an invitation to reweigh the evidence in his favor, which we may not do. There is no dispute that Thomas’s report omitted any reference to his gun-toting sidekick’s presence at and involvement in the police-action shooting on Moss Street. By any reasonable measure, Thomas’s report was incomplete. At the hearing before the Board, Assistant Chief John Doughty testified,

The omission by Sergeant Thomas caused me not to forensically examine the side of the house where Nick Kokot ran around the back armed and confront the subjects that ran out of the house. I’ll never again have that opportunity. I could not look for casings on that side, I don’t know if Nick Kokot fired on that side. I didn’t check Nick Kokot’s weapons that night, which he had that I was unaware of. I would have done those things if I would have known Nick was involved in that call and gone around the back of the house.

Appellant’s App. at 99-100.¹

¹ When asked if Thomas had explained the reason for the omission, Assistant Chief Doughty replied,

I don’t believe he ever told me his personal reasoning, why he didn’t tell me. He once said we’ll cross that bridge when we come to it and the second time we discussed it ... he told me I didn’t ask him the right questions or he would have told me.

Appellant’s App. at 98.

Thomas brushes these considerations aside and points out that the department failed to provide him with legal representation after the shooting, as required by General Order 88-6. That provision states that the attorney “shall immediately proceed to the scene to meet with” the officer and “should assist the officer in drafting a formal statement as to the underlying facts and the reasonableness as perceived by the officer justifying his or her use of deadly force.” Appellant’s App. at 308C. Thomas’s claim that his egregious omission was “caused by the department’s failure to timely provide him with legal representation and assist in his preparation of the report” is self-serving and ignores the fact that the department’s duty to provide legal representation is entirely separate from an officer’s duty to submit an accurate, legible, and complete report. Appellant’s Br. at 13-14.

Thomas complains that

[h]ere, we have a 26 year veteran of the police force who had received numerous commendations and praise, was considered to have integrity and be above average by his superiors, but was fired for failing to disclose the presence of a civilian in his report about a justified police shooting.

Appellant’s Br. at 14. To the extent Thomas claims that his punishment does not fit the offense and is therefore arbitrary and capricious, we disagree. Of all people, a highly experienced and purportedly honest police officer should have recognized the serious ethical lapses and public safety hazards inherent in taking an armed citizen out on patrol without permission, allowing him to participate in a fracas that led to a police-action shooting, and then failing to mention the civilian’s involvement in an initial report of the incident. Based on the foregoing, we cannot conclude that the Board’s termination of Thomas’s employment was arbitrary and capricious. Therefore, we affirm.

Affirmed.

BARNES, J., and BRADFORD, J., concur.